Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

ROBERT L. FELLIN,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Pennsylvania, Middle District

PETITION FOR A WRIT OF CERTIORARI

HELEN WANG, ESQUIRE
Attorney for Petitioner
ASSOCIATE OF MICHAEL R. LYNN, ESQUIRE
115 Iron Street
Bloomsburg, PA 17815
(717) 784-3701
I.D. #51972

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether the August 2, 1993, Order and Opinion disposition by the Superior Court of Pennsylvania, in reversing the Common Pleas Court's allowance of withdrawal of guilty plea so deviates and conflicts with the appropriate case law and legitimate statutory interpretation of the due process provisions of the Fifth and Fourteenth Amendments of United States Constitution, as applied to the facts here in issue as to require treatment by this Honorable United States Supreme Court.

(2) Whether the August 2, 1993 Order and Opinion of the Superior Court of Pennsylvania, so violates and conflicts with case law and legitimate interpretation of the provisions regarding the right to the assistance of counsel of the Sixth Amendment of the United States Constitution as to require treatment by this Honorable United States Supreme Court.

(3) Whether the August 2, 1993 Memorandum Opinion of the Superior Court of Pennsylvania so violates and conflicts with the spirit of such cases as *Williams v. U.S.*, 1035 S.Ct. 573 (1982) and *U.S. v. Gearin*, 496 F.2d 691 95 S.Ct. 789, 415 U.S. 1113, 42 L.Ed. 2d 810 (1974), that require a factual basis for guilty plea, as to require treatment by this Honorable United States Supreme Court.

PARTIES

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THIS CASE

(a) August 25, 1992 Opinion, of the Court of Common Pleas, Judge Lokuta granting Motion to Withdraw Guilty Plea; (appended)

(b) August 2, 1993 Memorandum Opinion of the Superior Court of Pennsylvania reversing lower Court ruling. (appended)

STATEMENT OF GROUNDS OF JURISDICTION

Sought for Review are the Judgment of the Pennsylvania Superior Court dated August 2, 1993 reversing the lower Court's allowance of withdrawal of guilty plea and denying Motion to Withdraw Guilty Plea; Order dated October 6, 1993 denying Reargument/Reconsideration; and the Order of May 10, 1994 of the Pennsylvania Supreme Court, Middle District, denying "Petition for Allowance of Appeal".

Jurisdiction is conferred by 28 U.S.C. SubSection 1254 ss.(1), and Supreme Court Rules, Rule 17(c).

United States Constitution Amendments In Issue

This case principally involves the provisions of (1) the Fifth Amendment of the United States Constitution which provides, in relevant part, " . . . No person shall be held to answer for a capital, or otherwise infamous crime,

unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation"; (2) the Fourteenth Amendment, in relevant part, " . . . Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law."; nor deny to any person within its jurisdiction the equal protection of the laws"; and (3) the Sixth Amendment, in relevant part," . . . In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

CONCISE STATEMENT OF THE CASE

Petitioner, Robert L. Fellin, was charged in Luzerne County with rape, statutory rape, involuntary deviate sexual intercourse, indecent exposure, indecent assault and corruption of minors.

A plea agreement was struck between the Commonwealth of Pennsylvania by the District Attorney's Office of Luzerne County and Defendant then represented by Public Defender, Lewis Bott, which plea agreement provided that Defendant would plead guilty to one count of statutory rape, one count of indecent assault and three counts of corruption of the morals of a minor. The remaining charges per that plea agreement would be nolle prossed.

The conduct which gave rise to the criminal proceedings stemmed from Fellin's intimate relationship with his stepdaughter.

Prior to entering into the guilty plea, Defense counsel Bott never explained to Petitioner the elements of each crime charged, (see June 4, 1992 transcript N.T. P. 24) to which he would ostensibly be entering a guilty plea. Of particular significance in the instant matter was the required element of "penetration" regarding the crime of "statutory rape". Further Bott engaged in no discovery (See June 4, 1992 N.T. PP.7,8 and P.41) nor did he make any efforts as regards the preparation for a viable defense (see June 4, 1992 N.T. P. 13 and P.38) to that or any other charge. In fact as the record reflects, Fellin at sentencing colloquy testified truthfully that such penetration had at no time occurred. (See June 4, 1992 N.T. P.33, PP.48, 49 and P. 38).

The record establishes and Fellin steadfastly adheres to the factual premise that he at no time had intercourse with his stepdaughter but nonetheless he, because of the ineffectiveness of counsel found himself pleading guilty to "statutory rape", a key element of which requires intercourse with the inherent requisite element of "penetration" of his penis into the "victim's" vagina, which was at no time established or admitted to. There is simply no factual basis for Fellin's negotiated plea of guilty to this criminal offense without admission as regards such penetration.

After Petitioner was sentenced to a four (4) to eight (8) year minimum period of incarceration, Defendant moved to withdraw his guilty plea on April 28, 1992. The lower Court held a hearing on Petitioner's Motion on June 4, 1992 and issued an Order granting his Motion. In a rare circumstance the Commonwealth appealed this determination, the Pennsylvania Superior Court reversing the lower Court ruling resulting in the guilty plea being deemed binding. Motion for Reconsideration submitted to the Superior Court was denied as was "Petition for Allowance of Appeal" to the Pennsylvania Supreme Court.

STAGE OF PROCEEDINGS WHERE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED

All issues were first raised in Fellin's lower Court Motion to Withdraw Guilty Plea filed by Petitioner on

April 28, 1992, said issues also were presented in mounting opposition to the Commonwealth's position as Petitioner's on Appeal; on Reconsideration Application with the Pennsylvania Superior Court as well as "Petition for Allowance of Appeal" filed with Pennsylvania Supreme Court.

ARGUMENT

(1) Whether the August 2, 1993, Memorandum Opinion disposition by the Superior Court of Pennsylvania, in reversing the holdings of the lower Court which had allowed Fellin to withdraw his guilty plea so deviates and conflicts with the appropriate case law and legitimate statutory interpretation of the due process provisions of the Fifth and Fourteenth Amendments of the United States Constitution as applied to the facts here in issue as to require treatment by this Honorable United States Supreme Court?

Due process is violated whenever the performance of counsel, whether retained or appointed, is so deficient as to render the proceedings fundamentally unfair. *U.S. v. Alrarez*, 580 F.2d 1251, (1978). A significant factor in determining whether a plea is intelligently and voluntarily entered into is whether it was based on advice of competent counsel. *Willbright v. Smith*, 745 F.2d 779 (1984). It violates due process for a Court to accept an involuntary guilty plea. *Chrisco v. Shafran*, 507 F.Supp. 1312 (1981).

In the instant case, Fellin's guilty plea was not a voluntary or intelligent one due to ineffectiveness of his counsel. According to *White Hawk v. Solem*, 693 F.2d 825,

certiorari denied, 105 S.Ct. 1505 (1982), for a guilty plea to be voluntary and entered in accordance with due process, the Defendant must have been informed of the nature and elements of the charges against him and acknowledge that his conduct met the elements. One element for the charge of statutory rape is "penetration", (see 18 Pa. C.S.A. ss.3122.) The lower Court correctly cited *Commonwealth v. Henninger*, 25 D. & C. 3d 625 (Erie, PA 1981) to establish that it is necessary for the male sex organ to penetrate the female organ in order for statutory rape to occur.

At no time did Petitioner admit that he had penetrated the alleged victim's sexual organ (See N.T. P.33, P.38, P.48-49). He pled guilty due to his ignorance of the requisite elements of the crime, which is largely attributable to the fact that his attorney never explained to him what the elements of the crimes charged were. (*Haacks v. Wainwright*, 387 F.2d 176, (1968)). Further clearly, it was incumbent upon the Common Pleas Court Judge to refuse the plea of guilty to those offenses where the record belied the requisite factual basis. This constitutional mandate as regards the knowing and voluntary plea of guilty to a criminal charge, requiring the enunciation of the elements of the crime, and the Defendant's affirmative assertion that indeed he did engage in those behaviors, rises to the level of constitutional dimensions, such that the Pennsylvania Superior Court's conclusion that somehow those interests are secondary to the preservation of the sanctity of the preference that a guilty plea not be withdrawn after sentencing, is clearly unconstitutional anathema to the thrust of the United States and Pennsylvania Constitutional Structure.

(2) Whether the August 2, 1993 Memorandum Opinion of the Superior Court of Pennsylvania, reversing the holdings of the Court of Common Pleas allowance of withdrawal of this guilty plea so violates and conflicts with case law and legitimate interpretation of the provisions regarding the right to the effective assistance of counsel of the Sixth Amendment of the United States Constitution as to require treatment by this Honorable United States Supreme Court.

The Sixth Amendment of the Constitution guarantees the "effective" assistance of counsel. *Moorefield v. Garrison*, 464 F.Supp. 892 (1979). This Sixth Amendment guarantee of the right to effective counsel implicitly requires reasonably competent and effective representation. *U.S. v. Coupez*, 603 F.2d 1347 (1979).

In the instant case, Petitioner's counsel at the guilty plea proceedings, Public Defender Bott, never explained to Petitioner the elements of the crime charged (See Argument 1), never prepared any potential defenses (See N.T. P.13, P.38) nor advised Fellin as to the existence of such defenses which would include "lack of penetration" relative to the statutory rape charge which he, as counsel, actively persuaded Fellin to plead to, spent very little time with Petitioner prior to the encouraging of him to enter into the guilty plea, (see N.T. P.7-7, P.24-26) and did not do any discovery work. (See N.T. P.7-8, P.41). Most significantly however, it cannot be allowed to stand and it should be deemed ineffective assistance of counsel when at the guilty plea colloquy, there appears no acknowledgment on the record by Fellin to having perpetrated a mandated element of the felony charged.

According to *Owens v. Wainwright*, 698 F.2d 1111, certiorari denied., 104 S.Ct. 117 (1983), in connection with a guilty plea, counsel has certain recognized obligations including the assisting of a Defendant in determining whether to enter into a guilty plea, which inherently requires the defense attorney to be sufficiently familiar with the facts and law so that he can advise the Defendant meaningfully on the available options, and the strengths and weakness of pursuing those, to ensure that Defendant's choice, as in this case to plead guilty is an informed and meaningful one. Obviously part of the process by which to accomplish this involves the investigation and explanation of potential defenses, which was not engaged in by Attorney Bott in the instant context. (See N.T. P.13, P.38, P.39-40).

According to *Alicea v. Gagnon*, 675 F.2d 913 (1982), in determining whether there was effective assistance of counsel rendered, the reviewing Court must focus on the "totality of circumstances". Gauged by a "totality of circumstances" standard, the Sixth Amendment right to effective assistance of counsel was clearly violated by defense counsel's allowing Fellin to enter a guilty plea to nominal crimes, the elements of which counsel did not advise Fellin, and regarding which element Fellin on the record denied he had perpetrated.

(3) Whether the August 2, 1993 Memorandum Opinion of the Superior Court of Pennsylvania so violates and conflicts with the spirit of such cases as *Williams v. U.S.*, 1035 S.Ct. 573 (1982) and *U.S. v. Gearin*, 496 F.2d 691 95 S.Ct. 789, 415 U.S. 1113, 42 L.Ed. 2nd 810 (1974), that require the existence of a factual basis for a guilty plea, as

to require treatment by this Honorable United States Supreme Court?

A Trial Court may not enter judgment resulting from a guilty plea without first independently satisfying itself that there is a factual oasis for the plea. *U.S. v. Gearin*, 496 F. 2d 691, certiorari denied, 95 S.Ct. 789, 419 U.S. 1113, 42 L.Ed.2d 810 (1974). A District Judge may not accept the guilty plea until he has determined there is a factual basis for the plea. *U.S. v. Wetterlin*, 583 F.2d 346, certiorari denied, 99 S.Ct. 1044, 439 U.S. 1127, 59 L.Ed.2d 88 (1978).

In the instant case, since Petitioner did not commit the act of penetration against the alleged victim, (See N.T. PP.32-33, P.38, PP.48-49) and so stated at the proceedings, there could be no legitimate factual basis on which to accept his guilty plea to the offense of "statutory rape". According to *U.S. v. Untiedt*, 479 F.2d 1265 (1973), the establishment of a factual basis for guilty plea, thorough judicial inquiry is required, so that it may be judicially determined that all the elements of an offense were present, and that the Defendant acknowledges that presence. In this case, the colloquy revealed that the element of penetration or sexual intercourse having taken place was, per the colloquy testimony of Fellin lacking, (See N.T. PP.32-33, P.38, PP.48-49) and hence no viable guilty plea could be communicated. *Williams v. U.S.*, 103, S.Ct. 573 (1982) states that, the purpose of requiring a factual basis for a guilty plea is to assure the Court that conduct which Defendant admits by his plea of guilty constitutes the offense charged. In the instant case, Defendant never

admitted penetration, (See N.T. P.32-33, P.38, P.48-49) therefore, there was no factual basis for a guilty plea.

Respectfully Submitted:

HELEN WANG, ESQUIRE
Attorney for Petitioner
Associate of MICHAEL R.
LYNN, ESQUIRE
115 Iron Street
Bloomsburg, PA 17815
(717) 784-3701
I.D. #51972

COMMONWEALTH OF PENNSYLVANIA Appellant v. ROBERT LEE FELLIN, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 02988 Philadelphia 1992

Appeal from the Order Entered August 25, 1992, in the Court of Common Pleas of Luzerne County, Criminal, No. 1184, 1184-A, 1184-B of 1991

BEFORE: McEWEN, KELLY, CERCONE, JJ.

MEMORANDUM:

(FILED AUG 2 – 1993)

The Commonwealth has taken this appeal from an order which granted the motion of appellee to withdraw his negotiated[1] guilty plea to offenses of statutory rape, corruption of minors, and indecent assault, for which he was sentenced to serve a total term of imprisonment of from four years to eight years. One week after the imposition of sentence, appellee filed a motion to withdraw his guilty plea and, following a hearing, the trial court granted the motion to withdraw the guilty plea and directed that the case be scheduled for trial. We are obliged to vacate that order and to reinstate the judgment of sentence.

---

[1] The Commonwealth proceeded to *nol pros* charges of rape, involuntary deviate sexual intercourse, indecent exposure, and indecent assault.

The charges against appellee arose from the sexual perversion in which he had engaged with his stepdaughter from the time that she was seven years of age until she was 10 years of age, and assertedly included intercourse, fellatio, cunnilingus, the use of a vibrator, and viewing a pornographic film.

It is well established:

> That after sentence has been imposed, a defendant seeking to withdraw his guilty plea must demonstrate that so manifest an injustice has occurred that withdrawal of the guilty plea is justified.
>
> That such a manifest injustice occurs if a guilty plea is involuntary or entered without a full understanding of the charges to which the guilty plea was entered.

Commonwealth v. Khorey, 521 Pa. 1, 555 A.2d 100 (1989); *Commonwealth v. Martin*, 416 Pa.Super. 507, 611 A.2d 731 (1992).

The order which triggered this Commonwealth appeal was entered in response to an application of appellee (1) to withdraw his plea, and (2) to modify the sentence. The application of appellee proceeds to an extended recitation of reasons why guilty plea counsel was ineffective but, quite significantly, does not present or suggest or hint that he is not guilty of the charges of statutory rape, corruption of minors, and indecent assault – charges to which he entered a plea of guilty after guilty plea counsel had negotiated *nol pros* by the Commonwealth of charges which included rape and involuntary deviate sexual intercourse. Significant, as well, is the fact

that two of the three arguments presented by appellee relate to the sentence imposed.

Our focus is not, however, the sentence but the assertion that the plea was involuntary by reason of the following ineffectiveness:

> Since counsel testified that appellee consistently denied any vaginal penetration, and since penetration of the vagina is crucial to the proof of the crime of statutory rape, counsel was ineffective for permitting appellee to plead guilty to the crime of statutory rape.
>
> Since the Information to which appellee pleaded guilty did not set forth at least one specific date, counsel was ineffective for permitting appellee to plead guilty to counts within the Information.

The latter assertion merits but summary rejection since the evidence indicates that appellee admitted that he had engaged in sexual activity with his little stepdaughter for three years commencing from the time when she was seven years of age, while the Information to which he pleaded guilty charged that appellee engaged in such activity "at diverse dates during the period of 1985 to 1988".

As for the initial argument, the Criminal Code recites:

> **§ 3122. Statutory rape**
>
> A person who is 18 years of age or older commits statutory rape, a felony of the second degree, when he engages in sexual intercourse with another person not his spouse who is less than 14 years of age.

> 1972, Dec. 6, P.L. 1482, No. 344, § 1, effective June 6, 1973. As amended 1976, May 18, P.L. 120, No. 53, § 1, effective in 30 days.

18 Pa.C.S. § 3122, and defines the proscribed "sexual intercourse" as follows:

> **"Sexual intercourse."** In addition to its ordinary meaning, includes intercourse per os or per anus, with some penetration however slight; emission is not required.

18 Pa.C.S. § 3101. Thus, the persistent denial of appellee that he had engaged in vaginal intercourse with the child is specious in view of the overwhelming evidence, including his admissions, that he had engaged in cunnilingus. *See: Commonwealth v. Hitchcock*, 523 Pa. 248, 565 A.2d 1159 (1989).

Nonetheless, the focus of our inquiry is whether the guilty plea was knowing and voluntary. We are obliged in the conduct of such a study to consider the totality of the circumstances. *Commonwealth v. Zorn*, 397 Pa.Super. 231, ___, 580 A.2d 8, 9 (1990). Central to reflection upon the totality of the circumstances is an examination of the guilty plea agreement executed by appellee, as well as the transcript of the guilty plea hearing. The guilty plea agreement is composed of 13 pages and 66 questions. Appellee executed the guilty plea agreement at the end thereof, and signed each of the 12 pages of questions. Counsel for appellee also executed a separate three-page questionnaire composed of 13 questions, including an affirmative response to the question of whether he

explained to his "client the elements of each of the offenses charged in the Information".[2]

The transcript of the guilty plea hearing reveals that appellee affirmatively stated during the guilty plea colloquy conducted by the court that:

> He was aware of his right to a trial by a jury composed of 12 individuals who would have to reach a unanimous agreement on each of the charges before he could be found guilty, that he could proceed to trial before the judge sitting without the jury, that the Commonwealth had the burden of proof to demonstrate the guilt of appellee beyond a reasonable doubt, that he was entitled to the assistance of counsel in the selection of a jury, that he understood the range of sentencing, that he had an opportunity to discuss the case with his attorney, that the terms of the sentence to be imposed were within the sole discretion of the judge, that he entered into the guilty plea of his own free will, that he had signed a guilty plea agreement at the end and, as well, had signed the bottom of each of the 12 pages of the guilty plea agreement, and that he understood each of the questions upon the guilty plea agreement.

The Assistant District Attorney, following this colloquy, described as follows the facts from which the charges arose:

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[2] Some observers would suggest that the form of questionnaire presented for review and execution by appellee should also inquire whether "counsel has explained to you the elements of each of the offenses charged in the Information".

THE COURT: Before I accept this guilty plea, may I hear the facts.

MS. HANLON [Assistant District Attorney]: Yes, Your Honor. Your Honor, the victim in this case, 14-year-old Allison Fellin, is the adopted daughter of the defendant, Robert Fellin.

The victim would testify in this matter that when she was approximately 6 or 7 years old the defendant began fondling his daughter which progressed to them having sexual intercourse on many occasions. The victim would describe the sexual assault as progressing to his putting his penis in her vagina. The acts continued until approximately four years ago from today's date, Your Honor.

The defendant had admitted to the investigating officer that he had begun fondling his daughter when she was 6 or 7; he forced her once to have oral sex and she didn't like it. He showed her porno films and gave her a vibrator and told her how to use it. He admits performing oral sex on her. These continued, these acts continued throughout numerous residences of the family, including Peace Street in Hazleton, Ebervale and Jeansville.

He admits to fondling her private parts, and her touching his penis which was initiated by Allison. However, the victim would testify to the court that the defendant told her when she was six years old that it was normal for daughters to have intercourse with their fathers and that, as a matter of fact, her mother was

informed of them and approved of such behavior.[3]

When guilty plea counsel advised the court that he did not have any cross-examination, the court accepted the guilty plea and advised appellee of his right "to withdraw your guilty plea".

Pa.R.Crim.P. 319(a) directs that a trial judge "shall not accept [a guilty plea] unless he determines after inquiry of the defendant that the plea is voluntarily and understandingly tendered. Such inquiry shall appear on the record". The transcript of the guilty plea hearing reveals a full colloquy was conducted and appellee repeatedly affirmed that no promises concerning the sentence had induced his plea. Appellee also affirmed, during the colloquy, that he understood the rights surrendered by virtue of his plea, and that his decision to plead guilty was a voluntary one.

As earlier noted, the trial court advised appellee at the conclusion of the guilty plea hearing on January 29, 1991, that he had the right to withdraw the plea. Appellee did not, during the three months which elapsed before the sentencing hearing, express any misgiving about his guilty plea. Moreover, when appellee appeared for the

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[3] Some observers would suggest that trial prosecutors more wisely serve during a guilty plea hearing to complement the recitation of the facts by posing to the defendant certain quite specific questions designed to secure admissions from the defendant which would further demonstrate the knowledge of and understanding by the defendant of the elements of the offenses for which he is charged.

imposition of sentence three months later, he acknowledged, in response to questions by the court, that he had "made the guilty plea voluntarily", that he did recall the advice of the court at the time of the guilty plea that he could have proceeded within ten days to withdraw the guilty plea, that he wished to be bound by the terms of the plea agreement, and twice stated that he did not desire to withdraw the guilty plea.

On week after sentence was imposed, however, appellee filed the instant motion to withdraw plea and modify sentence, as a result of which the trial court proceeded to a hearing on June 4, 1992, at which:

> Appellee testified that he himself had made a notation of guilty following the charges of indecent exposure and corrupting the morals of a minor, while noting his innocence of the charges of rape and statutory rape, and his innocence of certain of the other charges "by reason of confused facts".
>
> Appellee testified that he decided to plead guilty because he "had no idea what defense [guilty plea counsel] was going to bring forth for me; that in light of that and the humiliation that my wife and stepdaughter would have to go through in taking the stand, it was the only thing I could do".
>
> Appellee admitted that he signed the guilty plea agreement, and that he "knew what the charges were in word only, not in deed".
>
> Appellee denied the recollection of any discussion concerning the withdrawal of the charge of involuntary sexual intercourse which would

have called for a five year mandatory minimum sentence.

We are convinced that the term of the sentence triggered the effort to withdraw the guilty plea and that, on this record, the claim that the guilty plea was not knowingly entered is a contrived effort to secure a lesser sentence or to defer execution of the sentence imposed. It is axiomatic that disappointment regarding a sentence does not compose "manifest injustice" for purposes of a post-sentence motion to withdraw a plea because the plea withdrawal procedure must not be used as a "sentence testing" device. *Commonwealth v. McClendon,* 403 Pa. Super 467, 470, 589 A.2d 706, 709 (1991), *allo. denied,* 528 Pa. 622, 597 A.2d 1151 (1991).

Order reversed. Judgment of sentence reinstated. Jurisdiction relinquished.

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS OF LUZERNE COUNTY CRIMINAL DIVISION
v.	:	
ROBERT LEE FELLIN	:	No. 1184, 1184A, 1184B – 1991
Defendant	:	
	:	Before: Lokuta, J.

OPINION

The Defendant herein, Robert Lee Fellin, originally appeared before the Honorable Hugh Mundy in conjunction with this matter on January 22, 1992. At that time, Defendant indicated to Judge Mundy that he did not wish to plead guilty and that he was requesting a new Public Defender. Judge Mundy denied the Defendant's latter request and Attorney Lewis Bott remained counsel of record.

On January 29, 1992, the Defendant entered a Guilty Plea to one (1) count each of Statutory Rape, Indecent Assault, and three (3) counts of Corruption of Minors. The additional counts were nol prossed.

Subsequent to entering these Guilty Pleas, Defendant was sentenced on April 21, 1992, to a term in the aggregate, of four (4) to eight (8) years in a State Correctional Institute.

As a result thereof, Defendant filed a timely Motion to Withdraw Guilty Plea and Motion to Modify Sentence. A Hearing thereon was held June 4, 1992.

The thrust of Defendant's Petition was that, as a result of ineffective assistance of counsel, Defendant was

induced to plead guilty and, therefore, entered involuntary pleas of guilt.

At the Hearing, Attorney Bott testified for the Commonwealth and on both direct and cross examination, he admitted that the Defendant had consistently denied penetration as it related to the crimes involved. (N.T. 38, 48-49.)

Nevertheless, with Attorney Bott's advise [sic], Defendant pleaded guilty to Statutory Rape (18 Pa. C. S. A. § 3122), a basic element of which is penetration.

In order for sexual intercourse[1] to occur, the male sex organ must penetrate the female sex organ. See: *Commonwealth v. Henninger,* 25 D. & C 3d 625 (Erie, 1981).

Commonwealth v. Harris, 403 Pa. Super. 435, 589 A.2d 264 (1991), states:

> . . . the withdrawal of a guilty plea after sentence is imposed requires that Appellant establish prejudice that results in a manifest injustice. (Citation Omitted.) Proving manifest injustice requires that Appellant show his plea was involuntary or was entered without knowledge of the charge.

id., at 437, 589 A.2d at 265.

The aforementioned case would also stand for the proposition that the elements of the crime must be outlined in understandable terms. This Court can only conclude that the Defendant misunderstood the elements of

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[1] as it relates to the instant offense for which the Defendant is charged.

the crime of Statutory Rape and that his plea was not voluntary.

Accordingly, we enter the following

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS OF LUZERNE COUNTY CRIMINAL DIVISION
v.	:	
ROBERT LEE FELLIN	:	Nos. 1184, 1184A, 1184B – 1991
Defendant	:	

ORDER

AND NOW, this 25th day of August, 1992, at 1:52 o'clock p.m., it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. Defendant's Motion to Withdraw Guilty Plea is GRANTED;

2. The Office of the Court Administrator is directed to list this matter for trial during the next available Criminal Trial Term;

3. Defendant is to be immediately released from incarceration and Bail is to be reinstated in accordance with the same terms applicable prior to incarceration;

4. In accordance with Pa. C.P.R. 9024, the Clerk of Court shall forthwith furnish a copy of this Order to all attorneys of record.

BY THE COURT:

/s/ A. H. [Illegible]
J.

Office of District Attorney
For Commonwealth

Michael McGinley, Esq.
618 Center Street
Ashland, Pennsylvania 17921
For Defendant

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	No. 487 M.D. Alloc. Dkt. 1993
Respondent	:	Petition for Allowance of Appeal from Order of the Superior Court
v.	:	
ROBERT L. FELLIN	:	
Petitioner	:	

ORDER

PER CURIAM

AND NOW, this 10th day of May, 1994, the Petition for Allowance of Appeal is denied.

Mr. Justice Montemuro is sitting by designation as Senior Justice pursuant to Judicial Assignment Docket No. 94 R1800, due to the unavailability of Mr. Justice Larsen, see No. 127 Judicial Administration Docket No. 1, filed October 28, 1993.

COMMONWEALTH OF PENNSYLVANIA Appellant v. ROBERT LEE FELLIN	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 02988 Philadelphia 1992

ORDER

The court hereby denies the application filed August 16, 1993, requesting reargument/reconsideration of the decision dated August 2, 1993.

PER CURIAM

DATE: October 6, 1993

COMMONWEALTH OF PENNSYLVANIA Appellant v. ROBERT LEE FELLIN Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 02988 Philadelphia 1992

Appeal from the Order Entered August 25, 1992, in the Court of Common Pleas of Luzerne County, Criminal, No. 1184, 1184-A, 1184-B of 1991

BEFORE: McEWEN, KELLY, CERCONE, JJ.

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of LUZERNE County be, and the same is hereby REVERSED. JUDGMENT OF SENTENCE REINSTATED. JURISDICTION RELINQUISHED.

BY THE COURT:

/s/ DAVID A. [Illegible]
PROTHONOTARY

Dated: August 2, 1993

IN THE COURT OF COMMON PLEAS
OF LUZERNE COUNTY
PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	Criminal Action
VS	:	
ROBERT LEE FELLIN	:	No: 1184, 1184-A, 1184-B of 1991

TRANSCRIPT OF PROCEEDING

BEFORE: ANN H. LOKUTA, J.

DATE: June 4, 1992

PLACE: Luzerne County Courthouse
Courtroom No. 5
Wilkes-Barre, Pennsylvania

APPEARANCES:

INGRID CRONIN, ESQUIRE
Assistant District Attorney

MICHAEL McGINLEY, ESQUIRE

* * *

[p. 7] Bott concerning the case?

A He was one of three attorneys I looked up in the phone book seeking prices. His was the lowest but the lowest wasn't low enough for me. Then later I went to the Public Defender's Office, and he was assigned to my case.

Q Did you have a Preliminary Hearing?

A At the Magistrate?

Q Yes.

A It was waived.

Q Did Attorney Bott discuss any of the facts of the case with you at that time?

A Before or after it was waived?

Q Before it was waived.

A Yes, for approximately five minutes.

Q Was there any kind of a deal to drop charges in exchange of your waiver for the Preliminary Hearing?

A My understanding was that the deal was to drop charges. Later I found out that it was just counts of charges that were dropped.

Q Between the time when you waived the Preliminary Hearing and when you first appeared in the courthouse here, did you discuss any pretrial motions or discovery procedure with Attorney Bott?

[p. 8] A No, we did not.

Q When was the first time you saw Attorney Bott after the Magistrate's hearing?

A At my reading of my charges and the entrance of my plea.

Q That would be your arraignment?

A Yeah. Arraignment.

Q Did you have any discussions at that time concerning your defenses or the facts of the case?

A No.

Q Had you discussed the lack of a specific date with regards to the typewritten allegations that were made against you?

A No, we hadn't.

Q Did you ever discuss the circumstances of your two interviews with Trooper Mauro with Attorney Bott?

A We discussed the interview but not the circumstances.

Q Could you explain that please?

A Well, he asked me what did I tell Trooper Mauro. And I told him what I told Trooper Mauro. And he compared it with what information he had from Trooper Mauro.

* * *

[p. 13] A No. I was expecting a trial that date.

Q What happened, when you arrived?

A The District Attorney had not had anybody here. So the Commonwealth had requested time for that.

THE COURT: What do you mean he didn't have anybody here?

THE WITNESS: There was nobody here. He was prepared for a plea bargain.

BY MR. McGINLEY:

Q You are telling the Court that their witnesses were not present as far as you understand?

A They were not present. Right.

Q What happened after that?

A Me and my attorney went out to the hall; and I could hear them in here saying that they were going to call them and that they are going to be on their way. And I had asked my attorney at that time what defenses he had planned for me, which he answered, there is no defense for what you have done.

Q Did your attorney agree to wait for the witnesses to arrive?

[p. 14] A He agreed. He didn't ask me if I agreed.

Q Did he make any motions on your behalf?

A No, he didn't.

Q Nor a dismissal?

A Not to my knowledge.

Q But you did plead guilty that day, correct?

A Yes, I did.

Q What prompted you to plead guilty that day? Why did you decide to plead guilty?

A I had no idea what defense he was going to bring forth for me; and in light of that and the humiliation that my wife and stepdaughter would have to go through in taking the stand, it was the only thing that I could do.

Q Well, you had an option to plead guilty or to go to trial?

A I had come that day to go to trial. To further irritate the Court with another stand off or call off was not called for.

Q Now, with regard to the incident itself, as you have indicated, you marked on the information guilty in a couple places and innocent

* * *

[p. 24] Q Mr. Fellin, when you went to the Preliminary Hearing, Mr. Bott was there?

A At the Magistrate's?

Q Correct.

A Yes. He was there.

Q Did you have a discussion with him?

A Yes, I did.

Q Do you remember what that was about?

A The facts.

Q Was there any discussion as to how you would plead – I'm sorry, what charges might be dropped?

A I don't recall.

Q You don't recall a discussion happening about dropping the charge of involuntary deviate sexual intercourse which would result in a five year mandatory minimum? Do you recall that?

A I don't recall that.

Q You knew the charges that you were pleading guilty to at the time of the guilty plea, isn't that correct?

A No, I did not.

Q Had you seen the charges?

A I knew what the charges were in word only, not in deed.

[p. 25] Q Had Mr. Bott spoken to you several times before that whether on the telephone or in person?

A Before what?

Q Before the guilty plea. How much contact had you had between the Preliminary Hearing and the time of your guilty plea in front of this Judge? How many times did you speak to your attorney?

A We went in front of Judge Mundy and then in front of this Judge and between Mundy and this Judge my contact with him was possibly just the day I called him up to tell him that I had – what they send you that you have to go to Court, the date and whether I should meet him at the PD's office.

Q You didn't talk to him by telephone? You didn't call his office? Did he call you?

A What time?

Q Any time between the time of the Preliminary Hearing and the time of your guilty plea. What is your testimony as to the amount of contact that you had with Attorney Bott?

A And my guilty plea?

Q That's right.

[p. 26] A Well, we went to Mundy. I had contact with him then. And then there was my guilty plea. I had contact with him then.

Q No other contact other than the contact in the courthouse in front of a Judge?

A And over in the PD's office.

Q That would be three times you are telling me?

A That would be once before Mundy and once before the plea bargain.

Q And once in the PD's?

A No. Each time I would meet him at the PD's office.

Q So how many times did you meet him? How many times did Mr. Bott speak to you about this case? I want to make sure the record reflects as many times you remember meeting this attorney.

A Speak to me about the case? I can't give an estimate of that.

Q Did you ever take notes on the dates of these conversations? Did you take any notes during the conversation?

A There was no need to make notes. They were simplistic conversations.

* * *

[p. 32] Q Mr. Bott, there are various allegations made in a motion by the defense. I am going to ask you a

few question and then go through some of these allegations and have your response, so the Court may know your answers to these.

At the Preliminary Hearing, was any discussion entered into which involved the dropping of any charges for this Defendant?

A I had some lengthy discussion with both Mr. Fellin and with Officer Mauro on that date. And I can tell you what my notes indicate from that meeting. That was on May 8th of 1991. Mr. Fellin told me he was 32 years old. He was married.

THE COURT: Mr. Bott, we are trying to make a record, so please keep your voice up so this Court can hear you.

THE WITNESS: Mr. Fellin told me he was 32. He was married and separated. He had four children age 13, 10, 8, and 6 and that his only prior record was that as a juvenile for an unauthorized use of a motor vehicle.

He also said that he did not have a problem with drugs or alcohol. He had been [p. 33] examined in the past by mental health as a result of that unauthorized use charge.

He said that the whole thing began when his daughter began getting curious and opening his robe trying to get into his pajamas. He began fondling her about four and a half to five years before the date that I was speaking to him.

He began by touching her on her buttocks. Then he began down towards her vagina about nine months after

that. He began – she began touching his penis about five years ago.

Over the years he said he touched her vagina about three hundred times the last of which occurred about two and a half years before the Preliminary Hearing. He said that he never penetrated her with his penis.

* * *

She did not have oral intercourse with him.

He said he never forced her to do any of these activities. She'd found his vibrator and he caught her with it one day. Later

* * *

[p. 38] sexual intercourse charge that was the only charge that carried a mandatory sentence, that was a mandatory [illegible].

So the benefit in taking the plea agreement was that he was avoiding the mandatory sentence.

Q Did the Defendant willingly sign this plea agreement?

A Yes.

Q Now, I will ask you to respond to specific allegations made in the motion by the defense. Under 3-A that you never discussed any possible defenses in detailed with the Defendant?

A We talked about that I think every time we talked. I think he testified earlier he had no defense.

I think what I may have said to him is that he didn't have an affirmative defense like an alibi. He never denied

all of these allegations. He admitted certain sexual contract with the girl. What he denied was penetration, and on some occasions he denied oral intercourse but on some occasions he admitted that he did have oral intercourse.

And I said to him he may not [p. 39] have an affirmative defense except for him to get on the stand and tell the jury his side of the facts; and he would be admitting by getting on the stand that he did, in my opinion, at the very least was guilty of indecent assault and corruption of minors.

The only thing left for the jury to decide would be the credibility, whether or not he raped her as the girl alleged and whether or not he had involuntary deviate sexual intercourse as the girl alleged.

Q He further alleges that you never interviewed the victim, the victim's mother, the physician, or the children services case worker?

A That's true. I didn't see any need to interview the victim. He told me that he had committed involuntary deviate sexual intercourse and other acts of fondling and so on. And he confessed that to Trooper Mauro.

I didn't see the need to interview the victim especially under her circumstance, when she was having some emotional problems.

I knew he was separated from his wife. He never suggested to me that she [p. 40] should be talked to. He never suggested that they have any helpful testimony, and I never did. I didn't see any reason for it.

Q With reference to the children services case worker, you felt no need to interview them?

A I am not sure who you mean.

Q There is no name given on the forms admitted by the defense attorney. It simply talks about a referring physician. Did you speak to any physician?

A I didn't talk to any physician. I believe I set up the appointment at Northeast Counseling; and I intended to obtain a report from them for purposes of his diagnosis and prognosis and such. In fact, I did that and submitted that to be included in the PSI.

Q The Defendant talks about that you later informed him that in fact certain charges were supposed to be dropped following the Preliminary Hearing waiver. Can you tell the Court again which charges the gentleman is referring to?

A Well, the charges were not dropped at the Preliminary hearing. We simply entered a [p. 41] verbal agreement with the officer in charge that they would be dropped at the time of the plea in Court. It was my opinion Mr. Fgellin [sic] understood that on the date of the Preliminary Hearing.

Q He also further alleges you never obtained any discovery material on behalf of the Defendant.

A I did not file a discovery motion as I don't in most cases file them because the District Attorney's Offices in this county is very cooperative. And I simply go to them and ask them for whatever is in the file, and I did that in this case, and I obtained discovery items and reports that are here in my file.

I also advised Mr. Fellin that I had these materials. I don't know that I gave him a copy of it; but I do believe at least on one occasion in the hallway upstairs that I showed it to him and we went over it.

THE COURT: Mr. Bott, you did secure discovery in this regard; although you did it informally?

THE WITNESS: I did it without filing any motion. In most cases, the Commonwealth is agreeable and gives me a copy without filing a

* * *

[p. 48] CROSS EXAMINATION

BY MR. McGINLEY:

Q When did Mr. Fellin first indicate that he would plead guilty?

A The day of the Preliminary Hearing which was May 8, 1991.

Q You just testified that he was calling frequently during the period right before January 22nd though January 29th with different questions and you said something about changing his mind.

A Right.

Q Tell us what new questions they were first of all.

A Well, he would call asking to explain the charges, calling asking to explain what the sentences or what the maximum sentences would be, what I though about his getting on the stand to testify. Thing of that nature.

Q Now –

A And to tell me and recite his version of the facts over and over again.

Q And in that version of the facts, he was consistent in denying any penetration, correct?

[p. 49] A With his penis in the girl's vagina, yes.

Q Right up through the guilty plea?

A Yes.

Q Were you aware that none of the allegations contained in the information contain any one specific date as to when anything occurred?

A Yes.

Q Now, when you began your testimony, you mentioned that the notes you were referring to was from a discussion at the Preliminary Hearing, correct?

A Correct.

Q And I believe you prefaced that by saying lengthy discussion with both Mr. Fellin and Trooper Mauro at the Preliminary Hearing.

A Right.

MR. McGINLEY: I have nothing further.

THE COURT: Miss Cronin, do you have anything further.

MRS. CRONIN: No.

THE COURT: Mr. Bott, I have a few. How long have you been serving in this county as a

* * *